

Message Text

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TO AMEMBASSY LONDON IMMEDIATE

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FOR AMBASSADOR BOYD FROM UNDER SECRETARY COOPER

E.O. 11652: GDS

TAGS: EAIR, UK

SUBJECT: US-UK CIVAIR NEGOTIATIONS: CAPACITY

1. AS WE DISCUSSED IN WEDNESDAY TELECON, PROVISIONS OF US/RENEG/8 (REVISION IV) CONTAIN SEVERE RISK OF ACCOMPLISHING OVER TIME A MARKET-SPLITTING ARRANGEMENT THROUGH USE OF CONSULTATIVE MECHANISM OR LIMITATION/PENALTY PROVISIONS. JOHNSTON AND I AGREE WITH YOU THAT IT IS IMPERATIVE TO AVOID THIS RESULT AND EXPLICITLY TO INSURE THAT CAPACITY RESTRICTIVE MECHANISM IS TO BE USED FOR EXCEPTIONAL CASES ONLY AND IS NOT IN ANY WAY TO LEAD TO A MARKET DIVISION. THUS IT IS ESSENTIAL TO PREFACE THE ADDENDUM WITH AN EXPRESSION OF PRO-COMPETITIVE PURPOSE AND UNAMBIGUOUS RESERVATION OF THE RIGHT TO ADJUST MECHANISM IF EITHER PARTY CONCLUDES THAT IT IS BEING USED INAPPROPRIATELY OR IS HAVING PERVERSE EFFECTS. CAPACITY PROCEDURES MUST MINIMIZE CONFIDENTIAL

PAGE 02 STATE 135152

RISK OF BEING USED BY UK EITHER TO "FINE TUNE" CAPACITY OR TO ACHIEVE MARKET SHARE GOALS BY REPEATED CHALLENGES OF US AIRLINE CAPACITY AND ACROSS-BOARD RESORT TO LIMITATIONS AND PENALTIES. CERTAIN FEATURES OF CURRENT US PROPOSAL LEND THEMSELVES TO SUCH USE BY UK AND MUST BE REMOVED OR ALTERED. USDEL SHOULD TAKE POSITION THAT LIMITATIONS IN EVENT DISAGREED CONSULTATIONS NOW IN US VERSION (PARA 4) ARE AS FAR AS USG CAN GO. IN ADDITION, APPLICATION OF PENALTY CLAUSE

IN REV. IV MIGHT HAVE A PERVERSE CYCLICAL EFFECT, AS OVER-

CAPACITY MIGHT DEVELOP IN ONE SEASON DUE TO UNFORESEEN CHANGES IN THE WORLD ECONOMY AND TRIGGER PENALTY CLAUSES WHICH WOULD TAKE EFFECT IN THE NEXT CORRESPONDING SEASON WHEN THE ECONOMY MIGHT HAVE RECOVERED. FINALLY, WE ARE SERIOUSLY CONCERNED THAT THE MECHANISM COULD PLACE A SERIOUS ADMINISTRATIVE BURDEN ON USG TO REVIEW SCHEDULES IN DETAIL. THIS WOULD BE INCONSISTENT WITH THE POLICY OF THE FEDERAL AVIATION ACT OF ALLOWING DOMESTIC AIRLINES FREEDOM OF MANAGEMENT, AND THUS COULD INVITE CONGRESSIONAL CRITICISM AND POSSIBLY EVEN ACTION. FOLLOWING CHANGES IN US/RENEG/8 (REVISION IV) ARE DESIGNED TO ADDRESS FOREGOING CONCERNs AND OBJECTIVES. IF USDEL PROPOSES SUBSTANTIVE CHANGES PARA 2 BELOW, SHOULD SEEK APPROVAL.

2. FOLLOWING SHOULD BE ADDED TO INTRODUCTORY PARA:

"THIS ADDENDUM IS DESIGNED TO PROVIDE A CONSULTATIVE PROCESS TO DEAL WITH EXCEPTIONAL CASES OF EXCESS PROVISION OF CAPACITY, WHILE INSURING THAT DESIGNATED AIRLINES RETAIN FULL SCOPE FOR NON-PREDATORY COMPETITION AND THAT THE OVERALL MARKET SHARE ACHIEVED BY EACH DESIGNATED AIRLINE WILL DEPEND UPON PASSENGER CHOICE RATHER THAN THE OPERATION OF ANY FORMULA OR LIMITATION MECHANISM. THE CONTRACTING PARTIES RECOGNIZE THAT EXCESS CAPACITY MAY IN SOME CIRCUMSTANCES BE TEMPORARY, RESULTING FROM UNFORESEEN CHANGES IN THE INTERNATIONAL ECONOMY OR IN THE MARKET FOR INTERNA-

CONFIDENTIAL

PAGE 03 STATE 135152

TIONAL AIR TRAVEL GENERALLY. IN THAT EVENT, APPLICATION OF ANY SPECIFIC FORMULA OR LIMITATIONS TO THE NEXT CORRESPONDING SEASON COULD UNDULY RESTRICT CAPACITY AT A TIME WHEN ECONOMIC CONDITIONS MIGHT HAVE IMPROVED. IN ADDITION, THE CONTRACTING PARTIES RECOGNIZE THAT THIS ADDENDUM MAY NOT BE ADEQUATE TO DEAL WITH OTHER EXCEPTIONAL CIRCUMSTANCES, SUCH AS DISRUPTION OF SERVICE BEYOND THE REASONABLE CONTROL OF AN AIRLINE OR UNUSUAL MARKET CIRCUMSTANCES OR MARKETING ACTIVITIES BY AN AIRLINE. THE SPECIFIC NUMERICAL PROVISIONS OF THIS ADDENDUM ARE TO BE INTERPRETED (OR, WHEN APPROPRIATE, ALTERED) AS MAY PROVE NECESSARY TO REFLECT THESE OVERRIDING OBJECTIVES OF PRESERVATION OF A COMPETITIVE SYSTEM AND REFLECTION OF CURRENT ECONOMIC CIRCUMSTANCES. THE CONTRACTING PARTIES FURTHER RECOGNIZE THAT AIRLINE SCHEDULES ARE TO BE DETERMINED IN THE FIRST INSTANCE BY THE AIRLINES THEMSELVES, RATHER THAN BY THE CONTRACTING PARTIES, AND THAT OVERLY FREQUENT INVOCATION OF THE CONSULTATIVE MECHANISM OR LIMITATION PROVISIONS WOULD PLACE AN UNDUE BURDEN OF DETAILED SUPERVISION OF AIRLINE SCHEDULING ON THE CONTRACTING PARTIES OR MIGHT HAVE THE EFFECT OF CREATING A DIVISION OF MARKETS UNRESPONSIVE TO COMPETITIVE FORCES. IN THE EVENT THAT EITHER CONTRACTING

PARTY CONCLUDES THAT THE OPERATION OF THIS ADDENDUM HAS HAD

EITHER SUCH EFFECT, THE CONTRACTING PARTIES WILL REVISE OR RESTRICT THE OPERATION OF THIS ADDENDUM AS NECESSARY."

3. WE CONFIRM THAT CAPACITY PROCEDURES SHOULD NOT INCLUDE ANY SPECIFIED SEAT FACTOR OR SEAT FACTORS, WHETHER SHOWN AS AN INTERIM STANDARD OR NOT AND REGARDLESS WHETHER SEAT FACTOR APPLIES THROUGHOUT (AS BRITISH WANT) OR ONLY IN EVENT PENALTY CLAUSE IS APPLICABLE (AS IN US PROPOSAL).

4. FOLLOWING SENTENCE SHOULD BE ADDED TO PARA 1 TO AVOID IMPLICATION THAT SCHEDULES NOT FILED WITHIN 165 DAYS BEFORE SEASON CANNOT LATER BE AMENDED:

CONFIDENTIAL

PAGE 04 STATE 135152

"ADJUSTMENTS IN SCHEDULES MAY, HOWEVER, BE MADE AT ANY TIME, AND SUCH ADJUSTMENTS SHALL BE FILED WITH BOTH CONTRACTING PARTIES ON A TIMELY BASIS."

5. IN PARAS 2 AND 3, ALL REFERENCES TO "FREQUENCIES" SHOULD BE CHANGED TO READ "INCREASE IN FREQUENCIES" SO THAT IT IS CLEAR THAT ONLY INCREASES ARE SUBJECT TO PRE-SCREENING AND/OR CHALLENGE IN A CONSULTATION. FOOTNOTE APPLICABLE TO PARA 2 SHOULD BE DELETED.

6. IN PARA 3, CHANGE "FORECASTS BY EACH DESIGNATED AIR-LINE" TO "FORECASTS FOR EACH DESIGNATED AIRLINE."

7. PARAGRAPH 4.

A. PRIOR TO CURRENT ROUND OF TALKS, US POSITION WAS THAT, IN EVENT OF DISAGREED CONSULTATIONS, THE CHALLENGED CAPACITY INCREASE COULD BE FULLY OPERATED, WHILE UK POSITION WAS THAT NO INCREASE COULD BE OPERATED. CURRENT PARA 4 IS ESSENTIALLY A COMPROMISE BETWEEN ZERO INCREASE AND UNLIMITED INCREASE. THE FREE ZONE AND MINIMUM FREQUENCY LEVELS IN THE EARLIER US PROPOSAL WERE NOT MAXIMUMS IN EVENT OF DISAGREED CONSULTATIONS (THERE WERE NO MAXIMUMS) BUT MINIMUM LEVELS NOT SUBJECT TO PRESCREENING OR CHALLENGE. THEREFORE, IT DOES NOT FOLLOW (AS UK HAS ARGUED) THAT ANY COMMITMENTS WE MADE OR IMPLIED RE FREE ZONE AND MINIMUM FREQUENCIES UNDER EARLIER PROPOSAL ARE TRANSFERRED TO CURRENT US PROPOSAL.

B. US VERSION PARA 4 NOW PERMITS AN AIRLINE TO OPERATE A MINIMUM OF 30 ADDITIONAL FREQUENCIES DURING A SUMMER SEASON ABOVE NUMBER OPERATED DURING PREVIOUS SEASON, BUT ALWAYS ON TOP OF 150, FOR A TOTAL MINIMUM OF 180. THIS NUMBER PERMITS AN AIRLINE TO OPERATE, FOR EXAMPLE, DAILY FOR 15 WEEKS (105 FREQUENCIES) AND FIVE TIMES A WEEK FOR 15 WEEKS (75 FREQUENCIES). IF UK MINIMUM OF 120 FREQUENCIES IS

CONFIDENTIAL

PAGE 05 STATE 135152

ACCEPTED, ADDITION OF 30 GIVES 150 FREQUENCIES WHICH, FOR EXAMPLE, CAN BE USED TO OPERATE DAILY FOR ONLY TEN WEEKS AND FOUR TIMES A WEEK FOR 20 WEEKS. IF WE ACCEPT UK VERSION PARA 4 IN TOTO (I.E., 120 FREQUENCY MINIMUM AND ONLY GROWTH), AIRLINE WOULD HAVE TO FORECAST 25 PERCENT GROWTH TO GET 150 FREQUENCIES AND 50 PERCENT TO GET 180; AND SINCE AVERAGE OF FORECASTS IS USED, EVEN THESE RESULTS WOULD NOT BE ASSURED. MEANING OF FOREGOING IS THAT, UNDER NO CIRCUMSTANCES, SHOULD WE ACCEPT EITHER UK MINIMUM LEVEL OF 120 OR ADDITIONAL FREQUENCIES BASED ON GROWTH ONLY.

C. BOTH US AND UK VERSIONS OF PARA 4 APPLY THE LIMITATIONS TO ALL THE DESIGNATED AIRLINES ON THE GATEWAY ROUTE SEGMENT. LOGICALLY, LIMITATIONS SHOULD APPLY ONLY TO THE AIRLINE WHOSE FREQUENCIES HAVE BEEN CHALLENGED. IN PRACTICE, IF ONE SIDE CHALLENGES THE OTHER, THERE IS LIKELY TO BE A RECIPROCAL CHALLENGE, AND THEREFORE LIMITATION WOULD APPLY TO ALL AIRLINES. HOWEVER, IT WOULD BE PREFERABLE FOR PRESENTATIONAL REASONS TO CHANGE LANGUAGE SO THAT LIMITATION APPLIES ONLY TO THE AIRLINE OR AIRLINES WHICH HAVE BEEN CHALLENGED.

D. FOLLOWING REDRAFT OF PARA 4 REFLECTS FOREGOING AS WELL AS OTHER CHANGES TO TAKE INTO ACCOUNT VALID UK ARGUMENTS:

"IF NO AGREEMENT IS REACHED IN SUCH CONSULTATIONS, THE DESIGNATED AIRLINE OR AIRLINES WHOSE FREQUENCY OF SERVICE ON THE GATEWAY ROUTE SEGMENT HAS BEEN CALLED INTO QUESTION SHALL BE ENTITLED TO OPERATE DURING THE UPCOMING TRAFFIC SEASON THE SCHEDULE IT PROPOSES TO OPERATE, BUT NOT MORE THAN THE SUM OF (A) THE TOTAL NUMBER OF ROUNDTRIP COMBINATION FREQUENCIES OPERATED BY THAT AIRLINE ON THE GATEWAY ROUTE SEGMENT DURING THE PREVIOUS CORRESPONDING SEASON; AND (B) SUCH ROUNDTRIP COMBINATION FREQUENCIES AS ARE DETERMINED BY APPLYING THE AVERAGE OF THE FORECAST PERCENTAGE
CONFIDENTIAL

PAGE 06 STATE 135152

TAGES MENTIONED IN PARA 3 ABOVE TO THE TOTAL NUMBER OF ROUNDTRIP COMBINATION FREQUENCIES OPERATED BY THAT DESIGNATED AIRLINE DURING THE PREVIOUS CORRESPONDING SEASON, BUT NO LESS THAN 30 ROUNDTRIP COMBINATION FREQUENCIES DURING A SUMMER TRAFFIC SEASON OR 22 DURING A WINTER TRAFFIC SEASON. IN NO EVENT SHALL A DESIGNATED AIRLINE BE REQUIRED TO OPERATE LESS THAN 150 ROUNDTRIP COMBINATION FREQUENCIES DURING A SUMMER TRAFFIC SEASON OR 88 DURING A WINTER TRAFFIC SEASON."

8. LAST SENTENCE PARA 5 SHOULD BE CHANGED TO READ:

"SUCH AVERAGE SEAT FACTORS AS MAY BE DEVELOPED AND

ACTUALLY APPLIED FOR RATE-MAKING PURPOSES SHALL BE TAKEN

INTO CONSIDERATION IN ESTABLISHING A SEAT FACTOR UNDER
THIS PARAGRAPH."

9. PARAGRAPH 7.

A. THERE ARE A NUMBER OF DIFFICULTIES WITH THE CURRENT US AND UK VERSIONS OF PARA 7, NAMELY, (1) AN AIRLINE WHICH IS LIMITED UNDER PARA 4 BUT CORRECTLY FORECASTS THE MARKET CAN SUFFER A PENALTY UNDER PARA 7 WHILE THE AIRLINE WHICH UNDER-ESTIMATES THE MARKET CAN AVOID A PENALTY; (2) AN AIRLINE WHICH ACHIEVES THE SEAT FACTOR STANDARD CAN BE SUBJECT TO A NEW PARA 4 LIMITATION DURING THE NEXT CORRESPONDING SEASON; AND (3) IT IS POSSIBLE FOR AN AIRLINE TO BE FORCED TO OPERATE FEWER FREQUENCIES THAN IT DID DURING THE CORRESPONDING SEASON PRECEDING THE SEASON CALLED INTO QUESTION (ALTHOUGH THIS IS UNLIKELY IN VIEW OF THE MAXIMUM LIMITATION ALLOWABLE).

B. FOLLOWING REDRAFT OF PARA 7 REFLECTS FOREGOING, AS WELL AS SOME MINOR EDITORIAL CHANGES:

CONFIDENTIAL

PAGE 07 STATE 135152

"IF THE PROCEDURE SET FORTH IN PARAGRAPH 4 ABOVE HAS BEEN APPLIED, THE CONTRACTING PARTIES SHALL HOLD CONSULTATIONS NO LATER THAN 60 DAYS AFTER THE END OF THE TRAFFIC SEASON IN QUESTION TO DETERMINE WHETHER THE DESIGNATED AIRLINE OR AIRLINES WHOSE FREQUENCY OF SERVICE ON THE GATEWAY ROUTE SEGMENT WAS CALLED INTO QUESTION ACHIEVED THE REVENUE SEAT FACTOR ESTABLISHED FOR IT BY PARA 5 ABOVE. ANY SUCH DESIGNATED AIRLINE WHICH ACHIEVED THE SEAT FACTOR ESTABLISHED FOR IT MAY PROPOSE SUCH FURTHER INCREASES OF FREQUENCY ON THE GATEWAY ROUTE SEGMENT DURING THE NEXT CORRESPONDING SEASON AS IT DEEMS APPROPRIATE AND SUCH INCREASE SHALL NOT BE SUBJECT TO CHALLENGE UNDER PARAGRAPH 3 ABOVE. IF SUCH SEAT FACTOR WAS NOT ACHIEVED BY A MARGIN OF UP TO 10 PERCENTAGE POINTS, THAT DESIGNATED AIRLINE MAY NOT INCREASE ROUNDTRIP COMBINATION FREQUENCIES ON THE GATEWAY ROUTE SEGMENT DURING THE NEXT CORRESPONDING SEASON ABOVE THE TOTAL NUMBER OF ROUNDTRIP COMBINATION FREQUENCIES OPERATED BY IT DURING THE TRAFFIC SEASON IN QUESTION, UNLESS THE CONTRACTING PARTIES OTHERWISE AGREE. IF SUCH SEAT FACTOR WAS NOT ACHIEVED BY A MARGIN OF MORE THAN 10 PERCENTAGE POINTS, THAT DESIGNATED AIRLINE SHALL, UNLESS THE CONTRACTING PARTIES OTHERWISE AGREE, REDUCE THE TOTAL NUMBER OF ROUNDTRIP COMBINATION FREQUENCIES TO BE OPERATED ON THE GATEWAY ROUTE SEGMENT DURING THE NEXT CORRESPONDING SEASON BY THE PERCENTAGE BY WHICH ITS ACHIEVED SEAT FACTOR WAS LESS THAN THE SEAT FACTOR ESTABLISHED FOR IT BY PARAGRAPH 5 ABOVE, BUT IN NO CASE BY MORE

THAN 30 ROUNDTRIP COMBINATION FREQUENCIES DURING A SUMMER

TRAFFIC SEASON OR 22 DURING A WINTER TRAFFIC SEASON AND IN NO EVENT SHALL SUCH LIMITATION REQUIRE A DESIGNATED AIRLINE TO OPERATE LESS THAN 150 ROUNDTRIP COMBINATION FREQUENCIES DURING A SUMMER TRAFFIC SEASON OR 88 DURING A WINTER TRAFFIC SEASON OR LESS THAN THE NUMBER OF ROUNDTRIP COMBINATION FREQUENCIES OPERATED BY IT DURING THE CORRESPONDING SEASON PRECEDING THE SEASON THAT WAS CALLED INTO

CONFIDENTIAL

PAGE 08 STATE 135152

QUESTION. FREQUENCIES OF A DESIGNATED AIRLINE WHICH HAVE BEEN LIMITED BY THE OPERATION OF THIS PARAGRAPH SHALL NOT BE SUBJECT TO CHALLENGE ON THE SAME GATEWAY ROUTE SEGMENT DURING THE FOREGOING NEXT CORRESPONDING SEASON UNDER PARAGRAPHS 2 OR 3 ABOVE. THE LIMITATIONS SET FORTH IN THIS PARAGRAPH SHALL NOT APPLY TO (A) A DESIGNATED AIRLINE WHICH DID NOT INCREASE FREQUENCIES AS A RESULT OF THE ENTITLEMENTS IN PARAGRAPH 4 ABOVE; (B) A DESIGNATED AIRLINE WHICH, AS OF THE END OF THE TRAFFIC SEASON IN QUESTION, HAD BEEN OPERATING ON THE GATEWAY ROUTE SEGMENT FOR LESS THAN (BLANK) YEARS; AND (C) A DESIGNATED AIRLINE WHICH OPERATED NO MORE THAN 150 ROUNDTRIP COMBINATION FREQUENCIES ON THE GATEWAY ROUTE SEGMENT DURING A SUMMER TRAFFIC SEASON OR 88 DURING A WINTER TRAFFIC SEASON. IN ADDITION, IF THE FORECASTS PRESENTED PURSUANT TO PARAGRAPH 3 ABOVE WERE NOT IDENTICAL AND IF THE ACTUAL TOTAL ON-BOARD TRAFFIC GROWTH ON THE GATEWAY ROUTE SEGMENT EXCEEDED THE FORECAST OF A DESIGNATED AIRLINE, THAT AIRLINE SHALL NOT BE SUBJECT TO ANY LIMITATION UNDER THIS PARAGRAPH."

10. PARA 8 WAS INTENDED TO REFLECT CONCEPT THAT AN AIRLINE IS ALWAYS FREE TO MATCH ITS COMPETITION. HOWEVER, IT CAN BE READ TO MEAN, FOR EXAMPLE, THAT IF AIRLINE A IS SUBJECT TO A LIMITATION UNDER PARAGRAPH 4 WHICH IS LESS THAN WHAT IT WANTED TO OPERATE, AIRLINE B CAN MATCH A AT ITS LIMITED LEVEL EVEN THOUGH IT HAD NOT PLANNED TO, OR COULD NOT, MATCH A AT ITS ORIGINALLY PROPOSED LEVEL. THE SAME KIND OF RESULT COULD FOLLOW IN CONTEXT OF PARA 7. PARA 8 COULD ALSO BE READ TO MEAN THAT, IF AIRLINE B MATCHES ANY LIMITATION APPLICABLE TO A UNDER PARA 4, IT WOULD NOT BE SUBJECT TO ANY PENALTY UNDER PARA 7. IN PRACTICE, UK CAN ACHIEVE MATCHING BY ALWAYS FILING SCHEDULES WHICH MATCH ITS US AIRLINE COMPETITORS AND THERE IS NO WAY THIS CAN BE PREVENTED. HOWEVER, PARA 8 IS OBJECTIONABLE FROM A PRESENTATIONAL VIEWPOINT AND COULD MOREOVER LEAD TO UNINTENDED INTERPRETATIONS. THEREFORE

CONFIDENTIAL

PAGE 09 STATE 135152

PARA 8 SHOULD BE DELETED.

11. PARA 10 SHOULD BE DELETED SINCE IT IS NOW COVERED BY EXPANDED INTRODUCTION TO ADDENDUM.

12. MAXIMUM DURATION OF ADDENDUM SHOULD BE FIVE YEARS. CAPACITY PROBLEMS WERE CAUSED BY CONCURRENCE OF WORLD RECESSION, OIL PRICE INCREASE AND EQUIPMENT CHANGE; WE SEE NO REASON TO EXPECT PROBLEM TO BE PERSISTENT.

13. TALKED WITH DAVENPORT WHO CONCURS IN PRINCIPLE.

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